TUAN MAT TUAN LONIK

v.

PP

COURT OF APPEAL, PUTRAJAYA
SURIYADI HALIM OMAR JCA
WAN ADNAN MUHAMAD JCA
AHMAD MAAROP JCA
[CRIMINAL APPEAL NO: D-09-31-05]
26 NOVEMBER 2008

CRIMINAL LAW: *Penal Code - Section 376B - Incest - Sentence - 75 years' imprisonment and 50 strokes of rotan in total for five offences - Whether sentence reasonable in view of age of accused - Whether 50 strokes of rotan contravened s. 288(5) Criminal Procedure Code*

CRIMINAL PROCEDURE: *Sentence - Appeal against sentence - Incest - 75 years' imprisonment and 50 strokes of rotan in total for five offences - Whether sentence reasonable in view of age of accused - Whether 50 strokes of rotan contravened s. 288(5) Criminal Procedure Code - Penal Code, s. 376B*

The appellant pleaded guilty in the sessions court to five offences of rape punishable under s. 376B of the Penal Code. The victim was his stepdaughter who was below the age of 16 years at the time of the rape incidents. His acts of raping came to light when the victim delivered a baby boy. The appellant was convicted and sentenced to 15 years' imprisonment and 10 strokes of the rotan for each and every offence. Each sentence was to run consecutively from the date of arrest. In total, he would have to serve 75 years in jail and receive 50 strokes of the rotan. The appellant's appeal to the High Court was dismissed and the appellant now appealed to the Court of Appeal. The appellant was 48 years old before the Court of Appeal and if he were to serve the full 75 years, he would be 123 years of age when released.

Held (allowing the appeal)
Per Suriyadi Halim Omar JCA:

(1) Public interest played an important consideration when the sentences were imposed on the appellant. Public interest varies with place, time and circumstances of each case including the age of the offender and the prevalence of the offence. Due to

A the special relationship between the victim and the appellant, let alone the fact that the rape incidents were repeatedly carried out until an illegitimate child was born, the demand to satisfy society's needs to avenge the wrongful act of the appellant must take centerstage. (paras 13 & 14)

B

(2) The court must show its abhorrence of incestuous rape and impose the appropriate sentence in the circumstances of the case. Notwithstanding, the court did not go overboard by ignoring the law or even rationality and impose impossible C sentences. The span of 30 years sufficed to qualify as retributive and should be ordered against the appellant. Apart from the need for retribution, deterrence was also a factor to be considered to ensure that an offender did not repeat that offence. Indirectly a message was transmitted to potential D offenders for what would be in store for them if they were to cross the line. In the circumstances of the case, a lenient or reformative sentence might not be suitable. (paras 16, 17, 18 & 19)

E **(3)** A plea of guilt is a mitigating factor entitling the accused to some credit or discount on sentence. However, not all pleas of guilt may be accorded that privilege. A court has discretion to entertain such discounts. Incest statistically appears to be on the rise with the victims getting younger by the day as F reported daily by the media. No amount of consensual defence is accepted, whether on the ground of religion, morality or law. With the facts as they were, let alone the fact that public interest demanded a retributive and deterrence sentence, discounts were not appropriate herein. (para 20)

G **(4)** Under s. 282(d) of the Criminal Procedure Code ('CPC'), every sentence of imprisonment shall take effect from the date on which the same was passed unless the court passing such sentence otherwise directs. The CPC therefore empowers the judge with the necessary discretion as to when a sentence H should begin. Apart from the statutory provision, a rule has evolved whereby when the offences piled against an accused person are distinct offences, not emanating from the same transaction, the imprisonment sentences will invariably run consecutively. The purpose of it to run consecutively is to I discourage the type of criminal conduct, reflect the overall seriousness of the behaviour and the need to protect females.

In the present case, there was a need for each and every rape to be punished. If the sentence of the second charge was not ordered to run consecutively with the first charge, the appellant would be back on the streets to terrorise his family members and exact revenge on the wife who lodged the police report against him. (paras 22 & 23)

(5) It is statistically accepted that the average life span of a Malaysian man is 70 years whilst that of a Malaysian woman is 75. The appellant, being 48 years old, had on average 22 years of good life left. It would be bizarre to impose a sentence that would take him until the age of 123 years old knowing fully well that he would never serve the full term. With the sentences reduced to 30 years, the appellant would be 70 years of age – the average life of a Malaysian man – when released. Even if he lived to smell freedom at that age, the likelihood of him besetting and causing trauma to anyone was slim. Not only should public interest be taken into account of, the sentence imposed too must be fair and sensible. (paras 24 & 25)

(6) The learned judge contravened s. 288(5) CPC when he affirmed the 50 strokes of rotan for the five charges handed down by the Sessions Court. For offences legally punishable by whipping, the combined sentences of whipping should not exceed a total number of 24 strokes for adults. It followed that the total number of strokes from 50 should be reduced to 24. (paras 26 & 27)

[Appellant to serve 30-year jail term and to receive 24 strokes of rotan.]

Bahasa Malaysia *Translation Of Headnotes*

Perayu mengaku salah terhadap lima kesalahan merogol yang boleh dihukum di bawah s. 376B Kanun Keseksaan di Mahkamah Sesyen. Mangsa rogol adalah anak tirinya sendiri yang berumur di bawah umur enam belas tahun semasa kejadian-kejadian merogol berlaku. Perbuatan merogol perayu diketahui apabila mangsa melahirkan seorang bayi lelaki. Perayu dikenakan hukuman 15 tahun penjara dan 10 sebatan rotan bagi setiap kesalahan. Setiap hukuman diperintahkan berjalan berturut-turut dari tarikh penangkapan. Maka tempoh pemenjaraan yang mesti dijalani perayu berjumlah 75 tahun dan sebatan rotan pula berjumlah 50 bagi lima kesalahan tersebut. Rayuan perayu ke Mahkamah Tinggi

A ditolak dan perayu kini merayu ke Mahkamah Rayuan. Perayu berumur 48 tahun bila berhadapan Mahkamah Rayuan dan jika dia menjalani hukuman 75 tahun tersebut, dia akan berumur 123 tahun apabila dilepaskan.

B **Diputuskan (membenarkan rayuan)**
Oleh Suriyadi Halim Omar HMR:

(1) Kepentingan awam memainkan peranan penting dalam pertimbangan hukuman yang dikenakan di atas perayu. Kepentingan awam berubah mengikut tempat, masa dan
C keadaan setiap kes termasuk umur pesalah dan kelaziman kesalahan tersebut. Tuntutan masyarakat untuk menghukum perayu atas perhubungan khas di antara mangsa dengan perayu sehinggakan mangsa melahirkan seorang bayi harus diberi keutamaan.
D

(2) Mahkamah mesti menunjukkan kemeluatannya terhadap perbuatan merogol yang merupakan inses dan mengenakan hukuman yang sewajarnya atas perayu mengikut keadaan kes. Namun, mahkamah tidak melampaui undang-undang ataupun
E rasionalnya dan mengenakan hukuman-hukuman yang mustahil. Tempoh masa 30 tahun cukup berlayak retribusi dan mesti diperintahkan terhadap perayu. Selain daripada retribusi, pencegahan juga adalah satu faktor yang mesti dipertimbangkan untuk memastikan pesalah tidak mengulangi melakukan
F kesalahan tersebut. Secara tidak langsung, satu mesej dihantarkan kepada bakal pesalah-pesalah mengenai apa yang akan menantikan mereka jika melampaui batas. Dalam keadaan kes sedemikian, hukuman yang tidak keras atau reformatif tidak sesuai.
G

(3) Satu akuan bersalah adalah satu faktor peringanan yang memberikan hak kepada tertuduh untuk hukuman dikreditkan atau didiskaunkan. Namun begitu, bukan semua akuan bersalah diberikan keistimewaan tersebut. Mahkamah mempunyai
H budibicara untuk memberikan diskaun-diskaun sedemikian. Statistik menunjukkan inses semakin menaik dengan mangsa-mangsa semakin muda seperti yang direpotkan oleh media setiap hari. Pembelaan persetujuan langsung tidak boleh diterima, sama ada dari segi agama, moral atau undang-undang.
I Berdasarkan fakta kes termasuk fakta bahawa kepentingan awam menuntut hukuman secara retributif dan pencegahan, maka diskaun-diskaun tidak sesuai untuk diberikan di sini.

(4) Di bawah s. 282(d) Kanun Prosedur Jenayah ('KPJ'), setiap hukuman pemenjaraan akan mula berkesan dari tarikh ia diperintahkan kecuali jika mahkamah yang memberikan hukuman itu memerintahkan tarikh yang lain. Dengan itu, KPJ memberikan kuasa kepada hakim mengunakan budibicaranya untuk menentukan bila hukuman patut bermula. Selain daripada peruntukan statutori, adalah kebiasaan memerintahkan hukuman pemenjaraan berjalan berturut-turut di mana beberapa kesalahan berlainan dikenakan terhadap tertuduh yang bukan daripada transaksi yang sama. Tujuan sedemikian adalah untuk tidak mengalakkan perbuatan jenayah itu, menunjukkan secara keseluruhan betapa seriusnya kelakuan itu dan keperluan melindungi kaum wanita. Dalam kes semasa, terdapat keperluan untuk menghukum setiap tindakan merogol itu. Jika hukuman tuduhan kedua tidak diperintahkan berjalan secara berturut-turut, perayu akan kembali untuk mengancam ahli-ahli keluarganya dan membalas dendam atas isterinya yang melaporkannya kepada polis.

(5) Statistik menunjukkan bahawa tempoh hidup seorang lelaki warga Malaysia ialah 70 tahun manakala seorang perempuan warga Malaysia pula ialah 75. Perayu, kini 48 tahun, mempunyai 22 tahun lagi. Ianya pelik untuk mengenakan hukuman sehingga dia berumur 123 tahun walaupun diketahui tiada kemungkinan perayu dapat menghabiskan tempoh masa pemenjaraannya. Dengan mengurangkan hukumannya kepada 30 tahun, perayu akan berumur 70 tahun bila dilepaskan. Tidak mungkin perayu akan menyebabkan apa-apa trauma kepada sesiapa pun pada umur itu. Kepentingan awam bukan sahaja mesti dipertimbangkan tetapi hukuman juga semestinya adil dan saksama.

(6) Yang arif hakim melanggar s. 288(5) KPJ apabila beliau mengesahkan 50 sebatan rotan bagi lima tuduhan yang diberikan Mahkamah Sesyen. Bagi kesalahan-kesalahan yang boleh dihukum sebatan rotan, jumlah kesemuanya bila dicampurkan tidak boleh melampaui 24 sebatan. Ianya mengikut bahawa jumlah 50 sebatan rotan yang diperintahkan mesti dikurangkan kepada 24 sebatan rotan.

[Perayu diperintahkan menjalani 30 tahun pemenjaraan dan dikenakan sebatan rotan sebanyak 24.]

Case(s) referred to:
Datuk Hj Harun Hj Idris & Ors v. PP [1978] 1 MLJ 240 ***(refd)***
Lee Chow Meng v. PP [1976] 1 MLJ 287 ***(refd)***
Melvani v. PP [1971] 1 MLJ 137 ***(refd)***
New Tuck Shen v. PP [1982] 1 MLJ 27 ***(refd)***
Philip Lau Chee Heng v. PP [1988] 2 CLJ 873; [1988] 2 CLJ (Rep) 144 HC ***(refd)***
PP v. Chung Kwong Huah [1981] 1 MLJ 316 ***(refd)***
PP v. Dato' Nallakaruppan Solaimalai [1999] 2 CLJ 596 HC ***(refd)***
PP v. Govindnan Chinden Nair [1998] 2 CLJ 370 HC ***(refd)***
PP v. Jafa Daud [1981] 1 MLJ 315 ***(refd)***
PP v. Ravindran & Ors [1993] 1 MLJ 45 ***(refd)***
PP v. Sulaiman Ahmad [1992] 4 CLJ 2283; [1992] 3 CLJ (Rep) 447 HC ***(refd)***
PP v. Teh Ah Cheng [1976] 2 MLJ 186 ***(refd)***
PP v. Tia Ah Leng [2000] 5 CLJ 614 HC ***(refd)***
PP v. Yap Huat Heng [1986] 1 CLJ 81; [1986] CLJ (Rep) 645 HC ***(refd)***
R v. Ball [1951] 35 Cr App R 164 ***(refd)***
R v. Faulkner [1972] 56 Cr App R 594 ***(refd)***
R v. Vaitos [1981] 4 A Crim R 301 ***(refd)***
Re Chang Cheng Hoe & Ors [1966] 2 MLJ 252 ***(refd)***
Rex v. Kenneth John Ball [1951] 35 Cr App R 164 ***(refd)***
Sau Soo Kim v. PP [1975] 2 MLJ 134 ***(refd)***
Tan Bok Yeng v. PP [1972] 1 MLJ 214 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 173(b), (m)(ii), 282(d), 288(5), 289
Penal Code, ss. 376B(b), 392

Other source(s) referred to:
Emmins on Sentencing, 2nd edn, p 151

Appellant - In person
For the respondent - Shoba Venu Gobal; AG's Chambers

[Appeal from High Court, Kota Bharu; Criminal Trial No: 42-22-2004, 42-23-2004 & 42-24-2004]

Reported by Usha Thiagarajah

JUDGMENT

Suriyadi Halim Omar JCA:

[1] The appellant in this case was charged at the Sessions Court for five offences of rape punishable under s. 376B of the Penal Code in three separate cases. Three charges were registered in case no. 62-63-2004 and they were as follows:

1. rape punishable under s. 376B of the Penal Code, committed in June 2000, at about 2am in an unnumbered house at Kg. Sungai Mengkuang, Manek Urai in Daerah Kuala Krai, Kelantan on one XXX (identity card XXX) then aged 12 years 2 months old;

2. rape punishable under s. 376B of the Penal Code, committed in August 2001 at about 2am at the same place, on the same victim then aged 12 years 4 months old; and

3. rape punishable under s. 376B of the Penal Code, committed in March 2002, at about 5am at the same place, on the same victim then aged 12 years 11 months old.

[2] Another charge was filed in case 62-64-2004, also rape punishable under s. 376B of the Penal Code committed in June 2002, at about 11pm, at the same place, on the same victim then aged 13 years two months old as in the above charges. The fifth charge, in case no 62-65-2004 likewise was rape also punishable under s. 376B of the Penal Code, committed on 1 November 2003, at about 12 midnight at the same place, on the same victim then aged 14 years seven months old. All the five charges were heard together.

[3] The appellant pleaded guilty to all the five charges, and on conviction, was sentenced to 15 years imprisonment and ten strokes of the rotan for each and every offence. Each sentence was to run consecutively from the date of arrest. In a nutshell he would have to serve 75 years in jail and also receive a total of 50 strokes of the rotan. At the time when the appeal came before us he was about 48 years old, and if he were to serve the full 75 years, he would be 123 years of age when released.

[4] Dissatisfied with the orders of the subordinate court, the accused had filed an appeal at the High Court but was dismissed on 5 May 2005, with the sentences of the Sessions Court accordingly affirmed. The appellant then filed the appeal against sentence at the Court of Appeal hence the matter before us. This panel allowed the appeal. We now discuss the background facts of the case.

A **Background Facts Of The Case**

[5] The appellant is the stepfather of the victim. His acts of raping the victim came to light only when she delivered a baby boy at a hospital on 22 July 2004. The victim's mother promptly B lodged a police report of the rape incidents and on 28 July 2004 the appellant was arrested. Investigations revealed that the victim had been raped by the accused since year 2001 when she was only 12 years old. She was last raped in November 2003 when she was 14 years seven months old. The question of consensual C defence did not arise here as at the time of the rape incidents she never passed the age barrier of 16 years (s. 376B (b) of the Penal Code).

[6] At the Sessions Court after the plea of guilt, and also before D the High Court judge, the appellant had pleaded for leniency, and ventilated regrets for what he had done. He pleaded that he had a family comprising seven children of whom five were his own and two being stepchildren. The eldest child is 17 years old and the youngest nine months old. He ventilated that he supported his E parents by sending RM50 to them every month. At the High Court he also pleaded that the sentences run concurrently.

[7] The prosecution's stance was simple and straightforward. Offences of incest on a child below the age of 16 had taken place, and the imprisonment demanded should not be less than 18 F years and 10 strokes for each offence, with the sentences to run consecutively. This sentence would adequately teach the appellant a lesson, and simultaneously transmit the message to the public at large, of the heinousness of the offence. The fact that the victim is the step daughter of the appellant and had given birth to a G child was strenuously highlighted by the respondent.

[8] The learned High Court judge found that the punishment imposed by the Sessions Court was not excessive and indeed did commensurate with the seriousness of the offences. The learned H judge opined that in these types of offences despite the appellant having pleaded guilty, no amount of mitigating factors could override public interest. The appellant had failed his family, when instead of protecting his step-daughter, had instead taken advantage of her frailty. The learned judge too held the view that I the Sessions Court judge had jurisdiction to ascertain when the sentence should start as provided for under s. 282(d) of the Criminal Procedure Code.

[9] Despite the strength of the prosecution's case and the reasoning of the learned judge we allowed the appeal and accordingly varied the sentences. Our orders are as follows:

1. the appellant is to be imprisoned for 15 years for every offence;

2. the imprisonment sentence of the second charge is to run consecutively to the first charge.

3. the sentences of the third, fourth and fifth charges are to run concurrently with the sentence of the second charge;

4. the appellant is to receive four strokes of the rotan for the first offence; and

5. five strokes of the rotan for charges 2, 3, 4 and 5 respectively.

[10] The total effect is that the appellant will now serve a 30 year jail term and to receive 24 strokes of the rotan altogether.

Why The Crushing Sentence?

[11] Sentence is the last stage of a judicial process in a criminal case, and will inevitably take place at the end of a full blown trial or after a plea of guilt has been recorded. In both situations prior to the sentencing process a conviction must be recorded first. Punishments may vary due to the desire of arriving at different objectives, and en route to choosing that punishment, the court must weigh the interest of the public and that of the prisoner. Unfortunately many a time, the concept of public interest may take a twisted meaning, and be equated with public opinion. When public opinion takes the front seat then the demand for retribution takes prominence, resulting sometimes in inappropriate or even void sentences.

[12] Before applying the principles of sentencing in relation to the facts before us, let us peruse some of the relevant statutory provisions in the Criminal Procedure Code. Under s. 173(b) of the Criminal Procedure Code, if the accused pleads guilty to the charge, the court shall pass sentence according to law. Also under s. 173(m)(ii) of the Criminal Procedure Code, it is provided for that if the court finds the accused guilty, after the prosecution has proven its case beyond reasonable doubt, the court shall pass

A sentence according to law (*Re Chang Cheng Hoe & Ors* [1966] 2 MLJ 252; *PP v. Jafa bin Daud* [1981] 1 MLJ 315; *Philip Lau Chee Heng v. PP* [1988] 2 CLJ 873; [1988] 2 CLJ (Rep) 144; *PP v. Tia Ah Leng* [2000] 5 CLJ 614).

B **[13]** When this panel imposed the above sentences, we had to consider several factors but due to the factual matrix of the case, the factor of public interest was uppermost in our mind. Public interest varies with place, time and circumstances of each case including the age of the offender and the prevalence of the C offence. A certain type of sentence may not satisfy public interest at another place (*New Tuck Shen v. Public Prosecutor* [1982] 1 MLJ 27). The sentence must be deterrent enough, in that the prisoner will realize crime does not pay, with the punishment being debilitating to his freedom. Not only will would-be offenders be D deterred from trying but so will it deter repeat offenders (*Rex v. Kenneth John Ball* [1951] 35 Cr. App. R 164).

[14] The concept of retribution akin to 'tooth for a tooth', normally takes front stage if the offence is considered an offence E against a member of the public, especially here when a step-daughter has been raped repeatedly since of tender age. Due to the special relationship here between the victim and the appellant, let alone the rape incidents were repeatedly carried out until an illegitimate child was born, the demand to satisfy society's needs F to avenge the wrongful act of the appellant must take centre stage.

[15] For purposes of analogy, when reflecting on the abhorrence of firearms, in *PP v. Chung Kwong Huah* [1981] 1 MLJ 316 Chan J when referring to *Lee Chow Meng v. PP* [1976] 1 MLJ 287 and G *PP v. Teh Ah Cheng* [1976] 2 MLJ 186 had occasion to say:

> As for retribution, the time has come for the courts to show their abhorrence of offences involving the possession and use of firearms. Something has to be done to curb the unlawful H possession and use of such weapons before the situation gets out of hand … The public is entitled to be protected and it is not likely to be so protected if lenient sentences are passed.

[16] Likewise it was also timely that we show our abhorrence of incestuous rape and impose the appropriate sentence in the I circumstances of the case. Despite the above supplied facts and prognosis, this panel did not go overboard by ignoring the law or even rationality, and impose impossible sentences. We had

occasion to remark in open court that judges should not be blinded by emotion and react emotionally as the law is not as evil as the appellant. In the circumstances of the case, anything less than 30 years in jail would not suffice to qualify as retributive, hence that span of time ordered against the appellant.

[17] Apart from being convinced of the need of retribution, the factor of deterrence cannot lag very far behind, its purpose ostensibly to ensure that an offender does not repeat that offence. Indirectly a message is transmitted to potential offenders of what will be in store for them if they cross the line. In *R v. Ball* [1951] 35 Cr. App. R. 164, Hilbery J had remarked:

> A proper sentence passed … serves the public interest in two ways. It may deter others who might be tempted to try crime as seeming to offer easy money on the supposition, that if the offender is caught and brought to justice, the punishment will be negligible. Such a sentence may also deter the particular criminal from committing a crime again or induce him to turn from a criminal to honest life …

[18] In *Tan Bok Yeng v. PP* [1972] 1 MLJ 214, Sharma J had occasion to state:

> It is not merely the correction of the offender which is the prime object of punishment. The considerations of public interest have also to be borne in mind. In certain types of offences a sentence **has got to be deterrent so that others who are like-minded may be restrained from becoming a menace to society** (emphasis added)

[19] In the circumstances of the case, a lenient sentence, or reformative sentences may not be suitable.

[20] The appellant here had pleaded guilty to all the despicable offences committed during those years, when the stepdaughter was his ward. Even though a plea of guilt is a mitigating factor, and some credit or discount is normally given, not all pleas of guilt may be accorded that privilege. A court has the discretion not to entertain such discounts (*Sau Soo Kim v. PP* [1975] 2 MLJ 134; *Melvani v. PP* [1971] 1 MLJ 137; *PP v. Sulaiman Ahmad* [1992] 4 CLJ 2283; [1992] 3 CLJ (Rep) 447; *PP v. Ravindran & Ors* [1993] 1 MLJ 45). It is widely known that incest statistically appears to be on the rise, with the victim getting younger by the

day, as reported daily by the local media. And no amount of consensual defence will be accepted, be it on ground of religion, morality, or law. With the facts as they were, let alone public interest demands a retributive and deterrent sentence, discounts are not appropriate here (*PP v. Govindnan a/l Chinden Nair* [1998] 2 CLJ 370; *PP v. Dato' Nallakaruppan Solaimalai* [1999] 2 CLJ 596).

[21] The appellant is the authority in the household, and every member of the family would inevitably look up to him, not only for guidance, but also protection. Unfortunately the trust was betrayed when he took advantage of his power of strength by regularly forcing himself on the victim. In *Datuk Haji Harun bin Hj. Idris & Ors v. PP* [1978] 1 MLJ 240 the status of the prisoner was taken into account when the former Menteri Besar of Selangor, who had been convicted of the offences of forgery and conspiracy to commit criminal breach of trust, was treated to a more severe sentence. When imposing a higher sentence against the former Menteri Besar as compared to the co-accused, Wan Suleiman FJ had stated:

> We are of the opinion that he was the principal actor in this drama. But for him and his support for the big fight, these crimes might not have been committed and his co-accused who look up to him and were loyal to him might not have got into trouble … in view of … the need for people in public life to show a good example to those below them and of the serious breach of trust placed in him by the members of the bank who were poor people from rural areas who have a right to expect their leaders not to touch a penny of money entrusted to his care, we are of the opinion that this appellant should serve a longer period in prison than the second …

Why Must The Sentence Of The 2nd Charge Run Consecutively With The First Charge?

[22] Under s. 282(d) of the Criminal Procedure Code it is provided that 'every sentence of imprisonment shall take effect from the date on which the same was passed unless the court passing such sentence otherwise directs'. The Criminal Procedure Code thus empowers the judge with the necessary discretion when a sentence should begin. Apart from the statutory provision, a rule has evolved whereby when the offences piled against an accused person are distinct offences, let alone that they do not

emanate from the same transaction, the imprisonment sentences will invariably run consecutively. The purpose of it to run consecutively here is to discourage the type of criminal conduct, reflect the overall seriousness of the behavior, and the need to protect females (*R v. Faulkner* [1972] 56 Cr App R 594; *Emmins on Sentencing,* 2nd edn, p. 151; *R v. Vaitos* [1981] 4 A. Crim. R 301). In *PP v. Yap Huat Heng* [1986] 1 CLJ 81; [1986] CLJ (Rep) 645 the respondent was charged in the Sessions Court with two offences punishable under 376 of the Penal Code and another two offences punishable under s. 392 read with s. 397of the Penal Code. He pleaded guilty to all four charges and was sentenced to three years' imprisonment on each charge but the sentences were ordered to run concurrently. The Public Prosecutor successfully appealed against this sentence and order. The court when allowing the appeal and when discussing the issue of when a sentence ought to begin stated:

> Where two or more distinct offences had been committed, sentences of imprisonment should not be made to run concurrently. It should only be made concurrent when an offender had been convicted of a principal and a subsidiary offence. In all other cases sentences should be made to run consecutively.

[23] Here, where there is a need for each and every rape to be punished, let alone if the sentence of the second charge were not ordered to run consecutively with the first charge, the appellant in no time would be back on the street, not only free to terrorise his family members but also exact revenge on the wife who lodged the police report against him.

Why Are The Sentences Of Charges Three, Four And Five To Run Concurrently With Charge 2 When They Are Distinct Offences?

[24] An appellate court will not be overly ready to interfere with any sentence imposed by the trial court unless there are very good reasons to do so. For purposes of this case, suffice if we merely peruse the sentences meted down, subsequently to be affirmed by the High Court, from the point of view of logic. It is statistically accepted that the average life span of a Malaysian man is 70 years whilst that of a Malaysian woman 75 years. In time the average life span will increase. That being so, with the appellant now 48 years old, on average he has 22 years of good life left. To impose a sentence that will take him until the age of

123 years old, and knowing fully well that he never will serve the full term, not only is bizarre but strains the intelligence of the court. Any illogical sentence may attract unnecessary scrutiny and negative comments from the public on how we awkwardly conduct ourselves.

[25] With the sentences of the first and second charges to run consecutively, thus factually reducing the length of time of incarceration to 30 years, and with deductions thrown in for good behavior, by the time he is released he will be about 70 years of age ie, the average life of a Malaysian man. Even if he lives to smell freedom at that age the likelihood of him besetting and causing trauma to anyone is slim. Our orders not only has taken public interest into account but also made the sentence sensible and fair.

Why Reduce The Number Of Strokes

[26] The learned judge had affirmed the 50 strokes of rotan for the five charges handed down by the trial court. Despite having correctly alluded to all the correct principles regarding the imposition of the rotan, a major error was detected when he had contravened s. 288(5) of the Criminal Procedure Code. This provision provides:

> When a person is convicted at one trial of any two or more distinct offences any two or more of which are legally punishable by whipping, the combined sentences of whipping awarded by the Court for any such offences shall not, anything in any written law to the contrary notwithstanding, exceed a total number of twenty four strokes in the case of adults …

[27] In a gist after a conviction of any two or more distinct offences, any two or more of which are legally punishable by whipping, the combined sentences of whipping shall not exceed a total number of twenty four strokes in the case of adults. That would be the maximum number of strokes of the rotan on a convicted person to be imposed by a judge as empowered by the Criminal Procedure Code. With the law so clear this panel had no compunction in reducing the total number of strokes from 50 to 24 for the five charges.

[28] Despite the imposition of the above order by this panel, the probability of the 24 strokes of rotan being executed to completion is next to impossible. With the appellant's age being 48, and the first charge taking 15 years to exhaust, the maximum strokes that he will endure will only be four strokes. This is so as in two years time he will attain the age of 50. Under s. 289 of the Criminal Procedure Code no sentence of whipping shall be executed on any male that the court considers to be more than 50 years of age. Despite being aware of the futility of the imposition of the 24 strokes, and regardless of it, our orders were primarily to ensure that the right message was transmitted, to all the interested parties especially to younger offenders who may not be saved by age.

[29] Based on all the above reasons we allowed the appeal. We varied the High Court order as we refused to submit to public opinion; public opinion is like the sword of Damocles that hover over the head of any trial judge, constantly intimidating the court to surrender to the unreasonable demands of the public.